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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 404.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of ANNIE COHN,

Appellant,

v.

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,

Appellees.

On Appeal from the Supreme Court of the State of New York.

APPELLANT'S BRIEF

Official Reports of Opinions in the Courts Below

The opinion of HILL, P. J., in the Appellate Division holding the challenged tax unconstitutional is officially reported in 246 App. Div. 335.

The majority opinion of the New York Court of Appeals written by CRANE, Chief Judge, reversing the Appellate Division, and the dissenting opinion written by HUBBS, J., are officially reported in 271 N. Y. 353.

Statement as to Jurisdiction

Paragraph I of Rule 12 has been complied with. Hence no further statement of the grounds on which the jurisdiction of this Court is invoked is set forth.

This is an appeal from a final judgment of the Supreme Court of the State of New York, County of Albany, entered upon the remittitur of the New York Court of Appeals, affirming a final determination of the State Tax Commission, the appellees, which denied appellant's applications for refund of income taxes paid with respect to the calendar years 1931 and 1932.

A certiorari proceeding was brought by the appellant in said Court, under provisions of the New York State Income Tax Law (Tax Law, §§ 374, 375, 199*), to review and correct the final determination of the State Tax Commission, returnable before the Appellate Division, Third Department. The latter Court annulled the determination of the State Tax Commission. Mr. Justice RHODES dissented (R. 18-19).

The judgment of said Appellate Division was thereafter reversed and the determination of the State Tax Commis-

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*§374. *Revision and readjustment of accounts by tax commission.* If an application for revision be filed with the tax commission by a taxpayer within two years from the time of the filing of the return, * * * the tax commission shall grant a hearing thereon and if it shall be made to appear, upon any such hearing by evidence submitted to it or otherwise, that any such computation includes taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such amount so computed, the tax commission shall resettle the same according to law and the facts, and adjust the computation of taxes accordingly, and shall send notice of its determination thereon to the taxpayer.

§375. *Review of determination of tax commission by certiorari and regulations as to writ.* The determination of the tax commission upon any application made to it by any taxpayer for revision and resettlement of any computation of tax, as prescribed by this article, may be reviewed in the manner prescribed by and subject to the provisions of section one hundred and ninety-nine of this chapter.

§199. *Review of determination of tax commission by certiorari.* The determination of the commission upon any application made to it by any person, partnership, company, association or corporation for a revision and resettlement of any account, as prescribed in this article, may be reviewed both upon the law and the facts upon certiorari by the supreme court at the instance of any person, partnership, company, association or corporation affected thereby, and in the name and on behalf of the people of the state. For the purpose of such review the commission shall return, on such certiorari, the accounts and all the evidence before it on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon. If the original or resettled accounts shall be found erroneous or illegal, either in point of law or of fact, by the supreme court, upon any such review, the accounts reviewed shall then be corrected and restated, and from any determination of the supreme court upon any such review an appeal to the court of appeals may be taken by either party.

sion affirmed by the Court of Appeals of the State of New York (R. 32-34).

Judge HUBBS of the Court of Appeals dissented in a written opinion, in which Judges O'BRIEN and LOUGHRAN concurred (R. 24-30).

The order and judgment of said Court of Appeals were thereafter made the order and judgment of the said Supreme Court on July 14, 1936, and August 18, 1936, respectively (R. 32-34).

Statement

The appellant, a resident of the State of New York during the years 1931 and 1932 (R. 12), was the owner of a life estate in real and personal property in the State of New Jersey (R. 13). In February, 1913, Marcus Cohn, the husband of appellant, died, testate, a resident of the City of Paterson, County of Passaic, and State of New Jersey, devising and bequeathing to her the entire net income from his estate (after certain minor bequests) during her widowhood (R. 13). She filed income tax returns for the years 1931 and 1932 (R. 12), reporting that in 1931 her gross income was $40,547.38 and her net income $24,822.34 (R. 6-7); that all of said income was received (or credited to her account) from the Estate of Marcus Cohn, deceased, a non-resident estate (R. 14); that of said income $18,897.39 was rents from the following properties: 330 Main Street, 201 Main Street and 421 Main Street, all located in the City of Paterson, State of New Jersey (R. 6-7, 14), and $8,057.08 was interest from mortgages belonging to said non-resident estate, covering real estate in the State of New Jersey (R. 14); that in 1932 her gross income was $32,320.60 and her net income $19,535.02 (R. 8); that all of said income was received (or credited to her account) from said non-resident estate; that of said income $16,213.25 was rents from the aforesaid New Jersey properties and

$7,615.50 was interest from said New Jersey mortgages (R. 8). For the year 1931, she paid a tax of $792.89 and for the year 1932, $606.80, the latter tax, however, being reduced by a refund of $25.24 (R. 12-13).

Appellees concede that the Estate of Marcus Cohn, deceased, is a non-resident estate, created in 1913; that the executors thereof are David Cohn, Maurice Cohn and the appellant, all of whom qualified in 1913 and have been functioning in New Jersey ever since; that the office of the estate is and always has been at No. 112 Ellison Street, in the City of Paterson, State of New Jersey; that the estate has always been administered by the said executors in the State of New Jersey; that during the years 1931 and 1932, two of the executors, David Cohn and Maurice Cohn, were residents of the State of New Jersey; and that the aforesaid bonds and mortgages of said estate were always physically in the State of New Jersey and kept in a safe deposit box in the Paterson National Bank in Paterson, N. J. (R. 13-14). Since 1913, David Cohn and Maurice Cohn always acted as the agents of the appellant in the State of New Jersey, managed the aforesaid properties besides collecting the rents, collected the interest and the amortization payments on the bonds and mortgages, invested and reinvested same in the State of New Jersey, and received an annual compensation therefor.

Contemporaneously with the filing of her individual returns, the appellant filed information returns as an executor of the said non-resident estate (R. 13, 14, 15), indicating specifically the amounts of rents received, or credited to her account, from the New Jersey real estate and the amounts of interest from the New Jersey bonds and mortgages, as aforesaid for the years 1931 and 1932.

On or about April 12, 1934, the appellant duly made application to the State Tax Commission, the appellees, for income tax refunds of $792.89 and $606.80 (less $25.24 refund) for the years 1931 and 1932, respectively (R. 13), as erroneously paid or illegally collected, in the manner,

within the time and on the forms prescribed by the New York Tax Law and Regulations, and cited the case of *Pierson v. Lynch,* 237 App. Div. 763 (March 15, 1933) unanimously affirmed by the Court of Appeals without opinion, 263 N. Y. 533 (November 21, 1933), as authority therefor.

On May 14, 1934, the appellees notified the appellant that said claims for refunds would be held in abeyance pending a final determination in the case of *Pierson* v. *Lynch* which was to be carried to the United States Supreme Court (R. 4-5).

On January 21, 1935, the appeal in *Pierson* v. *Lynch* having been dismissed by this Court, 293 U. S. 52 (1934), the appellees notified the appellant that the State Tax Commission had not yet had sufficient time to determine the full effect of the decision as affecting other taxpayers who had not joined in the action; that the matter was being considered and at such time as the question was definitely decided any required adjustment of the returns of the taxpayer (the appellant) would be made (R. 5).

On July 24, 1935, the appellees wrote to the appellant that the Legislature in May, 1935, amended the Tax Law (Chap. 933, Laws of 1935)* by providing that the rental income derived by a resident of New York State from real property located without the State constituted taxable income; that the Law was made retroactive to January 1, 1919; and that the appellant's claims for refunds were denied (R. 4).

Appellant thereupon procured a writ of certiorari from the Supreme Court of the State of New York, returnable before the Appellate Division, Third Department. In her petition, she averred that the Tax Law of the State of New York in imposing a tax upon a resident on rents and mortgage interest derived from real estate in the State of New Jersey violated appellant's rights under the Constitu-

*Chapter 933, of the Laws of 1935, §359, as amended, is set forth on pages 7-8 of this brief.

tion of the United States and the Fourteenth Amendment thereof. The latter Court annulled the determination of the State Tax Commission. Presiding Justice HILL wrote the opinion of the Court, in which CRAPSER, BLISS and HEFFERNAN, JJ., concurred. Mr. Justice RHODES dissented without opinion (R. 18-19). The case is reported in 246 App. Div. 335 (1936). The opinion will be found on pages 21-22 of the Record. The Court held "that under the Fourteenth Amendment of the Federal Constitution it was not within the power of a state, irrespective of the wording of the statute, to tax a resident of the state on account of rentals or income received from land located beyond its borders."

The State Tax Commission took an appeal to the Court of Appeals, which Court reversed the order of the Appellate Division and affirmed the determination of the State Tax Commission. CRANE, Ch. J., wrote the opinion of the Court, in which LEHMAN, CROUCH and FINCH, JJ., concurred. HUBBS, J.. dissented in a written opinion, in which O'BRIEN and LOUGHRAN, JJ., concurred. The case is reported in 271 N. Y. 353 (1936), and the opinions will be found on pages 23-30 of the Record.

The judgment appealed from was thereafter entered upon the remittitur of the Court of Appeals (R. 34-35).

Questions Presented

The facts being stipulated (R. 12-16), only questions of law are involved in the instant case and presented by this appeal, namely, whether the State of New York can, consistently with the due process clause of the Fourteenth Amendment of the Constitution of the United States, impose its income tax on the income received by a resident of New York, consisting of rent from real property located in New Jersey, and of interest on bonds and mortgages physically located in and secured by real estate in New Jersey and having a situs in New Jersey; and, if so,

whether Chap. 933, Laws of 1935, is arbitrary, capricious and unreasonable and violative of the Fourteenth Amendment of the Constitution of the United States in so far as it operates retroactively so as to tax such income received three or more years prior to the enactment of said Chap. 933.

The Statute

The statute, the validity of which is involved, is Sec. 359 of the Tax Law of the State of New York, as amended by Chap. 933, Laws of 1935, page 1768, and reads as follows:*

> Sec. 359. *Gross Income Defined.* * * * "Includes gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, *and whether situated within or without the state,* growing out of the ownership or use of or interest in such property; also from interest, rent (*including rent derived from real property situated outside the state*), dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, including gains or profits or income derived through estates or trusts by the beneficiaries thereof, whether as distributed or as distributable shares, *it being intended to include all the foregoing items, without regard to the source thereof, location of the property involved, or any other factor, except only a case where the inclusion thereof would be violative of constitutional restrictions.* The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the methods of accounting permitted in this article, any such amounts are to be properly accounted for as of a different period; but,
>
> Sec. 2. *This act shall be retroactive to January first, nineteen hundred nineteen.*

*The matter in italics is new and was comprised in the Amendment of 1935, and is challenged in the instant case.

Sec. 3. This act shall take effect immediately." (May 16, 1935.)

The following section, as amended by Chap. 35, Laws of 1935, page 395 (February 16, 1935) of the Tax Law of the State of New York is involved in the determination of the validity of the challenged statute:

> Sec. 351. *Imposition of Income Tax.*—"A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: * * * A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state."

The Article of the Federal Constitution on which appellant relies:

> Article XIV, §1. "* * * nor shall any State deprive any person of * * * property, without due process of law, * * *."

Specification of Errors Assigned and Urged Upon This Appeal

The Court of Appeals erred:

1. In holding that Section 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, in so far as it imposes an income tax upon rents received by (or credited to the account of) a resident of this State from real property located in a foreign state, is not violative of or repugnant to the Fourteenth Amendment of the Constitution of the United States.

2. In holding that Section 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, in so far as it imposes an income tax upon interest received by (or credited to the account of) a resident of the State from bonds and mortgages physically located in and secured by real estate in the State of New Jersey, and which bonds and mortgages have a situs in the State of New Jersey, does not contravene the Fourteenth Amendment to the Federal Constitution.

3. In holding that Section 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, in so far as the following provision thereof (*i. e.*, "Sec. 2. This act shall be retroactive to January first, nineteen hundred and nineteen") is not violative of or repugnant to the Constitution of the United States, and particularly the Fourteenth Amendment thereof; in failing to hold that said retroactive provision is arbitrary, unreasonable and unjust.

4. In holding that Sec. 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, does not violate the Fourteenth Amendment to the Federal Constitution, in that its operation does not constitute double or multiple state taxation.

Summary of Argument

I. A tax upon rents from real estate is in substance and effect a tax upon the property itself. Therefore, an income tax imposed by a domiciliary state upon rents derived from real estate in a sister state is beyond the power of such state and violates the due process clause of the Fourteenth Amendment of the Federal Constitution.

The recent decisions of this Court hold squarely that a domiciliary state cannot impose either a property or an inheritance tax upon property with a situs in another state; neither can the domiciliary state measure such a tax

by reference to extraterritorial property. An *inheritance* tax impinges only once, while an *income* tax encroaches annually. *A fortiori,* a tax based on income derived from real property in another state should be inhibited as beyond the power of the domiciliary state and as contravening the Fourteenth Amendment.

II. This Court has held that intangible property with a business situs in one state cannot be legally taxed in another state. As income from property so situated is taxable by the state of situs it should not be taxable again, even by indirection, in another state.

III. This Court has repeatedly and emphatically expressed its hostility to multiple state taxation, as oppressive, confiscatory and illegal.

IV. Retroactive tax legislation attempting to tax income for more than a reasonable period prior to its enactment (in this instance, sixteen years) is arbitrary, unreasonable and unjust, and therefore unconstitutional.

ARGUMENT

POINT I

The domiciliary state lacks the power to tax income derived from real property located in a sister state.

(a) *No State may tax lands lying in another State. This is a basic and elementary principle in our jurisprudence.*

In *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 204 (1905), this Court said:

> "Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another state; much less where such action has been defended by any court."

In *Hoyt* v. *Commissioners of Taxes*, 23 N. Y. 224, 226 (1861), the Court of Appeals said:

> "It is conceded that lands lying in another State or country, cannot be taxed against the owner resident here, and no one ever supposed the contrary."

See also

Senior v. *Braden*, 295 U. S. 422 (1935);
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83 (1929);
Frick v. *Pennsylvania*, 268 U. S. 473 (1925);
Farmers' Loan & Trust Co. v. *Minnesota*, 280 U. S. 204 (1930);
Baldwin v. *Missouri*, 281 U. S. 586 (1930).

(b) *A tax upon the rents from real estate is in substance and effect a tax upon the real estate.*

In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 580, 581 (1895), Mr. Chief Justice FULLER, in delivering the opinion of this Court, said:

> "* * * Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other. We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income * * *."

And on rehearing, 158 U. S. 601, 630 (1895), the Chief Justice speaking for the Court, said:

"We have unanimously held in this case that, so far as this law operates on the exemptions from municipal bonds, it cannot be sustained, because it is a tax on the power of the states, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom."

In *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 275 U. S. 136, 140 (1927), Mr. Justice McREYNOLDS, delivering the opinion of this Court, said:

"* * * Certainly, since Gillespie v. Oklahoma, 257 U. S. 501, 505, it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom. To tax this would amount practically to laying a burden on the exempted principal. Accordingly, if the challenged act, whatever called, really imposes a direct charge upon interest derived from United States bonds, it is *pro tanto* void."

In *National Life Ins. Co.* v. *United States*, 277 U. S. 508, 521 (1928), Mr. Justice McREYNOLDS, delivering the opinion of this Court, said:

"It is settled doctrine that directly to tax the income from securities amounts to taxation of the securities themselves."

In *Opinion of the Justices*, 84 N. H. 559, 573, 574, 149 A. 321 (1930), the Supreme Court of New Hampshire said:

"The provision for the taxation of rents cannot be applied to rent paid for the use of real property situated outside the state, although the rent is received by a resident. It has always been the accepted rule that a state cannot lay a tax upon realty not within its jurisdiction. *Winnipiseogee Lake, etc., Co.* v. *Gilford,* 64 N. H. 337, 349. The same principle applies to tangible personal property. *Union, etc., Co.* v. *Kentucky,* 199 U. S. 194; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Winkley* v. *Newton,* 67 N. H. 80.

In *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, S. C. 158 U. S. 601, it was held upon great consideration that a tax laid upon rent is a direct tax upon the land out of which the rent issues. *Opinion of the Justices,* 77 N. H. 611, 615, 626. While the question, whether a state could tax rent received for the use of realty over which the state had no jurisdiction, was expressly excluded from consideration in *Union, etc.* v. *Kentucky, supra,* the logic of the later decisions points plainly to the conclusion that such a tax would be in violation of the provisions of the Federal Constitution. *Nat. Life Ins. Co.* v. *United States,* 277 U. S. 508; *Gillespie* v. *Oklahoma,* 257 U. S. 501.

We are of opinion that a state cannot tax income received as compensation for the use of either real estate or tangible personal property which has a *situs* outside the state. To avoid misapprehension, we add that this limitation does not apply to the taxation of intangibles owned by residents. *Hawley* v. *Malden,* 232 U. S. 1."

The Supreme Court of Massachusetts said (*Opinion of the Justices,* 220 Mass. 613, 624) (1915):

"* * * A tax upon the income of property is in reality a tax upon the property itself. Income derived from property is also property. Property by income produces its kind, that is, it produces property and not something different. It does not matter what name is employed. The character of the tax cannot be changed by calling it an excise and not a property tax. In its essence a tax upon income derived from property is a tax upon the property. This was decided after most elaborate consideration, with affluent cita-

tion of authorities, in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 581; S. C. 158 U. S. 601. We do not need to review that ground or to re-state the arguments in its support. It follows that a tax upon such income is a property and not an excise tax * * *."

See also

Harrison v. *Commissioner of Corporations and Taxation*, 272 Mass. 422 (1930);

Hart v. *Tax Commissioner*, 240 Mass. 37 (1921).

In *Pierson* v. *Lynch, et al.*, 237 App. Div. (N. Y.) 763 (1933) (unanimously affirmed by the Court of Appeals, 263 N. Y. 533) (1933), Mr. Presiding Justice HILL, in giving the opinion of the Court, said:

"'An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.' (Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 581.) 'In this court the presently approved doctrine is that no State may tax anything not within her jurisdiction without violating the Fourteenth Amendment. State Tax on Foreign-Held Bonds, 15 Wall. 300; Union Refrig. Transit Co. v. Kentucky, 199 U. S. 194; Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83.' (Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204, 210.) 'Taxation at the place of domicile of tangibles located elsewhere has been thought to be beyond the jurisdiction of the State.' (Lawrence v. State Tax Commission, 286 U. S. 276, 280.) The same opinion (p. 281) also speaks of 'the rule now established that tangibles located outside the State of the owner are not subject to taxation within it.' 'Tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place.' (Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83 93.) Analogy between tangible personal property with a fixed situs and real property would sustain the application of the same rule as to each. The rental income from this real property located in Ohio may not be included by the State of New York as a part of petitioner's income for the purposes of the income tax."

The majority opinion of the New York Court of Appeals in the instant case ignored the *Pierson* decision, which held squarely that rental received by a resident of New York from real property owned by her in Ohio was not taxable in the domiciliary state.

The majority opinion of the Court of Appeals overlooked *Senior* v. *Braden, supra.* This Court held that a property tax measured by the income yield of transferable trust certificates covering interests in realty in another State, was unconstitutional. *Maguire* v. *Trefry,* 252 U. S. 12 (1920) was distinguished. We quote from the opinion of the Court, delivered by Mr. Justice McReynolds:

> "Maguire v. Trefry, 252 U. S. 12, much relied upon by appellees, does not support their position. There the Massachusetts statute undertook to tax incomes; the securities (personalty) from which the income arose were held in trust at Philadelphia; income from securities taxable directly to the trustee was not within the statute. The opinion accepted and followed the doctrine of Blackstone v. Miller, 188 U. S. 189, and Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54. Those cases were disapproved by Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204. They are not in harmony with Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, and views now accepted here in respect of double taxation. See Baldwin v. Missouri, 281 U. S. 586; Beidler v. South Carolina Tax Comm., 282 U. S. 1; First Nat'l Bank v. Maine, 284 U. S. 312."

We submit that the Court of Appeals in deciding the case at bar misinterpreted or misconceived the true significance of the *Pollock* decision. It is true that the *Pollock* case decided *inter alia* that a tax on income from real estate was a direct property tax and that because it was not apportioned among the states as provided by the Constitution, it was void; but this conclusion was predicated upon the major premise that a tax on income or rents from real property was in substance and effect a tax upon the real estate. And regardless of our individual views of the

meaning of the concept "direct taxation" under the federal constitution prior to 1895, there is no escape from the sound reasoning of the *Pollock* decision.

The general rule* has always been, in the language of Coke:

> "But if a man seised of lands in fee by his deed granteth to another the profit of those lands, and to have and to hold to him and his heires, and maketh livery *secundum formam chartae*, the whole land itselfe doth passe; for what is the land but the profits thereof;" Co. Lit. 4b.

See also:

> *Knowlton* v. *Moore*, 178 U. S. 41, 81 (1900);
> *McCoach* v. *Minehill & Schuylkill Haven Railroad Co.*, 228 U. S. 295, 306 (1913);
> *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911).

Alexander Hamilton, discussing this subject asks: "What, in fact, is property, but a fiction, without the beneficial use of it?", and adds "In many cases, indeed, the *income* or *annuity* is the property itself." Hamilton's Works, Putnam's ed. vol. 3, p. 34.

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*We cannot resist quoting from the argument of the late Hon. Joseph H. Choate, one of the counsel in the Pollock case, because of its forceful application to the present issue.

"* * * If the court please, as to this matter of rent, is a tax on rent distinguishable from a tax on land? I say that a tax on land yielding income by whatever name is in reality, in effect and substance, a tax upon the rental. I speak now, of course, of rented property. I am not foolish enough to argue that a tax on rents is the same thing as a tax on land which nobody rents. I am looking, however, at the nature of the tax; not the form, but the substance. Your honors will observe that the tax laid by this law is a yearly tax upon the yearly rental. Can that be distinguished from a tax on land? How under heaven is a tax on land to be paid, except out of the income? How is it possible? I mean in the common, ordinary, practical business of life which the court is bound to look at. We are living under a constitutional government, are we not? We have regulated the measure of our own taxation by the Constitution. Was it intended that, although Congress could not put an unapportioned tax upon real estate it could put an unapportional tax upon rent of real estate and so eat all the real estate up? How can a man pay this five years' annual tax on real estate? Absolutely only out of the rental. Would any free people, if they had prohibited a land tax, submit to a tax on rentals?" (*Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, at page 540.)

In a comparatively recent case the basic doctrine of the Pollock decision, to the effect that a tax on the income from property is equivalent to a tax on the property itself, has been restated. In *Metcalf* v. *Mitchell,* 269 U. S. 514, 522 (1926), it was said by this Court:

> "* * * and when the instrumentality is of that character [having state immunity], the immunity extends not only to the instrumentality itself but to income derived from it."

For this statement this Court cited the Pollock decision and *Gillespie* v. *Oklahoma,* 257 U. S. 501 (1922). See also *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393 (1932).

While the appellant was a resident of the State of New York during the years in question (1931 and 1932), the real estate from which she derived the bulk of her income during said period was located in the State of New Jersey. In her individual returns, the appellant reported that the source of her income was the non-resident estate of Marcus Cohn, deceased, located and managed by her agents in New Jersey, and in the information returns which she filed simultaneously on behalf of the estate, she meticulously indicated the rentals of $18,897.39 for the year 1931 and $16,213.25 for the year 1932, derived through said estate from the following properties: 330 Main Street, 201 Main Street and 421 Main Street, all in the City of Paterson, State of New Jersey. The income tax forms prescribed by the appellees required that the appellant report specifically the rentals from each piece of real estate and the location thereof.

The Legislature, undoubtedly aware of the decision of the Court of Appeals in the *Pierson* case, incorporated in the amendment to the challenged act (Chap. 933, Laws of 1935, § 359), the following clause (which was implicit therein): "except only a case where the inclusion thereof would be violative of constitutional restrictions."

To the extent of the rentals from the real estate in the State of New Jersey reported by the appellant in her in-

come tax returns for the years 1931 and 1932, we submit that her income was not taxable in the State of New York and that her claims for refund duly filed under the existing law should have been granted.

POINT II

For the state of domicile to tax the income from property, intangible as well as tangible, which is physically located in or has acquired a business situs in another state, would violate the due process clause of the Fourteenth Amendment.

An intangible, the same as a tangible, can have only one situs. It cannot be in two places at the same time. An intangible with a business situs in one state is in the same category for taxation purposes as a tangible. It is not taxable in two states, and neither should the income therefrom be taxable by two states. See *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193 (1936), and cases cited therein.

The cases cited in Point I in support of the proposition that a tax on the income of property is in substance and effect a tax upon the property itself are equally applicable in support of this point. In order to avoid needless repetition, we are not citing them here.

See also

New Orleans v. *Stempel,* 175 U. S. 309 (1899);
Bristol v. *Washington County,* 177 U. S. 133 (1900);
State Board of Assessors v. *Comptoire, etc.,* 191 U. S. 388 (1903);
Metropolitan Life Insurance Co. v. *New Orleans,* 205 U. S. 395 (1907);
Liverpool & L. & G. Co. v. *Board of Assessors,* 221 U. S. 346 (1911).

In *Lawrence* v. *State Tax Commission,* 286 U. S. 276, this Court held that the State of Mississippi could tax a resident upon income from work (the construction of highways) done in the State of Tennessee. The opinion pointed out (at p. 281) that the source of the income, an intangible, was itself taxable, and said:

> "* * * It would be anomalous to say that although Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee, still, it could not tax the recipient of income upon payment of that same obligation. We can find no basis for holding that taxation of the income at the domicile of the recipient is either within the purview of the rule now established that tangibles located outside of the State of the owner are not subject to taxation within it, or is in any respect so arbitrary or unreasonable as to place it outside the constitutional power of taxation reserved to the State."

In other words, under the *mobilia* maxim the State of Mississippi had the power to tax the contract (to build roads in Tennessee); hence it could tax the income therefrom. The first part of the paragraph from which the above excerpt is taken, *i. e.*

> "It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on."

is not in harmony with the recent decisions of this Court and particularly *Senior* v. *Braden, supra,* and *Wheeling Steel Corp.* v. *Fox, supra.* Obviously, *Lawrence* v. *State Tax Commission, supra,* will be limited to the facts of that case.

All of the property of the non-resident estate of Marcus Cohn, deceased, real and personal, in which the appellant had a life estate was located and working in the State of

New Jersey, where concededly the executors were functioning since 1913 with an office at 112 Ellison Street, Paterson, New Jersey, and with the mortgage securities in a safe deposit box in the same State. All of the mortgage investments, the income from which was reported by the appellant in her information returns, were on real estate in the State of New Jersey and were invested and re-invested and all of her property managed by her agents there. In her returns, the appellant reported that she received from, or was credited with, the mortgage interest by said non-resident estate. All of the property, real and personal, and the income therefrom, in which the appellant was interested as a life tenant, had its source and fruition in the economic system of New Jersey.

We submit that the statute making such income taxable in the State of New York transcends the power of said State and contravenes the due process provision of the Fourteenth Amendment.

POINT III

Multiple state taxation contravenes the due process clause of the Fourteenth Amendment.

The State of New York, very properly, imposes a tax upon the entire net income received by natural persons not residents of the State, from all property owned by them in this State, and also upon the income derived by non-residents from every business, trade, profession or occupation carried on in said State (§ 351, Tax Law, p. 8 of this brief). But under the assailed statute, New York also taxes residents on income derived from real estate and from business with a situs in other States. Tax chaos will be the inevitable result if the other States follow the overreaching example of New York.

The power of taxation is indispensable to the very existence of the States. It is an essential function of govern-

ment. In respect to property, real and personal, and business carried on within their respective territorial limits, the power of taxation of the States, with certain limitations not material to our discussion, is absolute. Within their respective domains, they may tax directly or indirectly, lightly or heavily. If essential for governmental purposes, they may impose not only a property tax, a succession tax or an income tax, but also all three upon the same property simultaneously. *State Tax on Foreign Held Bonds,* 15 Wall. 300, 319 (1873).

This Court has pointed out that inheritance and property (intangible as well as tangible) taxes are both dependent upon jurisdiction of the property.

See:

Frick v. *Pennsylvania, supra*;
First Nat'l Bank v. *Maine,* 284 U. S. 312 (1932);
City Bank Farmers Trust Co. v. *Schnader,* 293 U. S. 112 (1934).

The State of New York has the legal power to tax any property that has a situs within its boundaries—real or personal, tangible or intangible—and it matters not whether the tax is an *ad valorem,* succession or income tax. Conversely, and regardless of whether or not the owner thereof is a resident within its domain, it has no right to tax any property, real or personal, tangible or intangible, which has a situs in another State. In short, the situs of the res, and not the domicile of the owner, is the *sine qua non* of tax jurisdiction.

The above principles are well expressed in *First National Bank* v. *Maine, supra,* at page 326, as follows:

> "It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently it became settled that the same rule applies with

respect to tangible personal property. And it now is established by the three cases last cited that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment."

See also

Pollock v. *Farmers' Loan & Trust Co., supra;*
Senior v. *Braden, supra;*
Farmers' Loan & Trust Co. v. *Minnesota, supra;*
Wheeling Steel Corp. v. *Fox, supra;*
Safe Deposit & Trust Co. v. *Virginia, supra;*
Opinion of the Justices (Mass.), *supra;*
In re Opinion of the Justices—Supreme Court of New Hampshire, *supra;*
Mayor & City Council of Baltimore v. *Gibbs,* 166 Md. 364 (1934).

Obviously, the State of New York here advocates double or multiple state taxation,—a condition making for clashing state sovereignties. The Constitution was intended to create among the States centripetal, not centrifugal, forces.

Now what would happen if the State of situs should impose a tax of 50% on income derived from property or on business done within its jurisdiction, and the domiciliary State should impose a similar tax? And let us assume further that neither State would allow as a credit or deduction* the tax paid to the other State. The two states would take the entire income for taxes. With the present tendency to increase rates of tax in all jurisdictions, such a case is by no means beyond the range of possibility and

*The allowance of a credit was held in *First National Bank* v. *Maine, supra,* not to save from unconstitutionality, and the same would seem to be true *a fortiori* of the allowance of a deduction.

emphasizes the necessity for a definite stand at this time against double taxation.

In recent years and particularly since 1930, this Court in unmistakable terms has repeatedly declared its hostility to double and multiple state taxation. With increasing vigor, the trend toward unitary taxation has progressed. While the Constitution does not in express language prohibit double taxation, it does inhibit the confiscation or taking of property without due process of law.

Indeed, multiple state taxation is doomed. As to realty, so far as we are aware, this has never been questioned. As to tangible personalty, this Court in *Frick* v. *Pennsylvania, supra,* held that a State statute attempting to tax the transfer of tangible property having an actual situs in another State, transcends the power of the State so attempting and contravenes the due process clause of the Fourteenth Amendment. Nor can an unconstitutional tax be justified by the argument that the extraterritorial property is used merely to measure the tax. *Farmers' Loan & Trust Co.* v. *Minnesota, supra,* and *Frick* v. *Pennsylvania, supra.*

Farmers' Loan and Trust Co. v. *Minnesota, supra,* explicitly over-ruling *Blackstone* v. *Miller,* 188 U. S. 189 (1903), did away with double taxation as to bonds; *Baldwin* v. *Missouri, supra,* accomplished the same result as to notes; *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1 (1930), as to credits; *The First National Bank of Boston* v. *Maine,* 284 U. S. 312 (1932), as to shares of stock.

See also:

Wheeling Steel Corp. v. *Fox, supra;*
Safe Deposit & Trust Co. v. *Virginia, supra;*
City Bank Farmers Trust Co. v. *Schnader, supra;*
Senior v. *Braden, supra;*
Farmers' Loan & Trust Co. v. *Minnesota, supra.*

In *First National Bank* v. *Maine, supra* (at p. 326), this Court stated: "The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds or property, is broader than the applications thus far made of it." In this case, the handwriting on the wall as to multiple state taxation is clearly obvious.

The *mobilia* maxim has been thoroughly emasculated. This fiction or presumption must now yield to the fact. Property, intangible as well as tangible, which has acquired an economic or commercial situs in another State no longer follows the domicile of the owner for taxation purposes. It is taxable at the situs of the property and not at the domicile of the owner; and if the State of domicile lacks the power to tax the property itself, it cannot tax the income derived therefrom. See *Pollock* v. *Farmers' Loan & Trust Co., supra,* and other cases cited in Point I (b).

POINT IV

The New York State Statute, passed May 16, 1935, in so far as it attempts to levy a retroactive tax on income received prior to 1934, was arbitrary and unconstitutional.

After the unanimous decision of the Court of Appeals in the case of *Pierson* v. *Lynch, supra,* the appellant, on April 12, 1934, in reliance thereon and in accordance with the law of the State of New York at that time, duly filed applications for refunds for income taxes paid by her for the years 1931 and 1932, on the forms prescribed by law, on the ground that the said taxes were erroneously paid or illegally collected. In acknowledging receipt of said claims for refunds, the appellees stated that "the claims for the years 1931 and 1932 will be held in abeyance pending the final determination in the case of *Pierson* v. *Lynch,* which

is to be carried to the United States Supreme Court" (R. 4-5). When this Court dismissed the *Pierson* v. *Lynch* case, the appellees wrote to the appellant on January 21, 1935, that "the Tax Commission has not as yet had sufficient time to determine the full effect of the decision in the Pierson case as affecting other taxpayers who did not join in the action. The matter is now being considered and at such time as the question is definitely decided any adjustment of the returns of the taxpayer which may be required will be made" (R. 5).

It was not until May 16, 1935, eighteen months after the decision of the Court of last resort in said State, thirteen months after appellant duly filed her application for refunds and four months after the dismissal of the *Pierson* v. *Lynch* case by this Court, that the Legislature of said State passed a law amending Section 359, Subdivision 1, of the Tax Law, which provided that the rental derived by a resident of New York State from real property located without the State of New York constitutes taxable income and made the law retroactive to 1919 and subsequent years, a period of sixteen years.

Tax laws which are retrospective are not *ipso facto* invalid. They violate the "due process clause" only when they are arbitrary, unreasonable and palpably unjust. Since the criterion is one of degree, one finds a variety of decisions, corresponding to the different types of tax involved.

The novel Federal Gift Tax of 1924 was held void as applied to a transfer made only ten days before its final enactment and after the taxing act had been introduced into Congress. *Untermyer* v. *Anderson,* 276 U. S. 440 (1928). Similarly, as to inheritance taxes, Chief Judge CARDOZO, writing for the unanimous court in *City Bank Farmers Trust Co.* v. *New York Central R. R. Co.,* 253 N. Y. 49 (1930), said at page 59 that "an act of the Legislature attempting to revoke the exemption" (from transfer tax liability) "in respect of past transactions would be a

denial of 'due process', and so of no effect." The imposition of a toll on the use of a canal two years before was likewise voided in *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338 (1922).

See also:

Ettor v. *Tacoma,* 228 U. S. 148 (1913);
Nichols v. *Coolidge,* 274 U. S. 531;
Coolidge v. *Long,* 282 U. S. 582;
Blodgett v. *Holden,* 275 U. S. 142.

At the other extreme, an assessment for betterments to realty was sustained even though enacted three years after the improvement was made. *Seattle* v. *Kelleher,* 195 U. S. 351 (1904). The opinion of Mr. Justice HOLMES, unanimously concurred in, states at page 359 that "the benefit was there, on the ground, at the city's expense.", and at page 360 that "the liability is one of the notorious incidents of social life."

Perhaps the best general rule to be derived from the cases is found in the words of Mr. Justice HOLMES, in *Forbes Pioneer Boat Line* v. *Board of Commissioners, supra,* where he noted at page 340 that "the transaction was not one for which payment naturally could have been expected."

Taking this as the standard of reasonableness, what has been the practice in levying income taxes? Here again, we find a common-sense summary in the brief opinion of Mr. Justice HOLMES, dissenting from the majority opinion that ten-day retroactivity was arbitrary in taxing gifts, in *Untermyer* v. *Anderson, supra,* at page 446: "We all know that we shall get a tax bill every year. I suppose that the taxing act may be passed in the middle as lawfully as at the beginning of the year."

The dissenting opinion of Mr. Justice BRANDEIS in the same case, pages 447-449, together with the footnote thereto, contains an exhaustive analysis of the various Federal

income tax statutes from the standpoint of retroactivity, and in footnote 2(b) at page 452, a similar analysis of British income tax statutes. In most of the examples, the law was passed during the current income-tax year; in a few, and those were generally in time of war, the taxing statute was enacted in the following year, the latest date being July 4, 1864.

With this background, it is hardly necessary to argue the point that the New York State income tax statute here involved, so far as it purports to impose a tax on income heretofore exempt, retroactively over a period of sixteen years, is arbitrary and unreasonable, certainly as to income received prior to the year preceding its enactment. Income taxes are supposed to be paid out of income. Of necessity, this requires that the tax be known not later than the succeeding year. After that time, it is common knowledge that the untaxed portion of the income is devoted to other purposes, and ceases to be available for "income tax" any longer. The present statute is an example of retroactivity run wild.

CONCLUSION

The judgment appealed from should be reversed.

Respectfully submitted,

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